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No. 99-1178

Supreme Court, U.S.
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In the Supreme Court of the United States

SOLID WASTE AGENCY OF NORTHERN COOK COUNTY,

Petitioner,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR THE PETITIONER

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By claiming to have jurisdiction over isolated, mainly seasonal ponds on SWANCC's land because migratory birds use them, the Corps obliterates the distinction between what is national and what is local. If federal authority reaches all water and wetlands used by Canada geese, mallard ducks, and other migratory birds (AR 15578), there is nothing to prevent the federal government from regulating every tree in which migratory birds roost and every lawn on which they feed. If migratory bird use supplies a sufficient connection to interstate commerce because duck hunters and bird watchers travel and spend money, then as amici California *et al.* concede (at 1), the federal government may regulate the eating of hamburgers because that adversely affects rainforests. On the Corps' theory of the commerce power, no non-commercial activity is beyond federal authority, for nothing is so far removed from interstate commerce that it cannot be linked to it in some fashion. Pet. Br. 43-44 & n.18. Its approach leaves the commerce power "without effective bounds" that are "essential to the maintenance of our constitutional system" of enumerated federal powers. *Morrison*, 120 S. Ct. at 1748; *Lopez*, 514 U.S. at 555.

Whether or not it is unconstitutional for an agency to seize on non-commercial migratory bird use as an excuse for imposing federal regulation under the Commerce Clause, at minimum it gives rise to "grave and doubtful constitutional questions." *Jones*, 120 S. Ct. at 1911. The Clean Water Act provides for jurisdiction over "navigable waters," defined as "waters of the United States." Nothing in that language, other provisions of the CWA, or legislative history shows a "clea[r] indication" or "unmistakable intention" to reach isolated ponds that are neither navigable nor connected to navigable waters, just because they are used by migratory birds. *DeBartolo*, 485 U.S. at 575; *Five Gambling Devices*, 346 U.S. at 450; see *infra*, pages 10-19. Migratory birds are among the beneficiaries of the CWA, but there is no plausible claim that they are a mandatory marker of the Act's jurisdictional reach. Though the Corps attempts to show that "waters of the United States" include more than "navigable waters," it does not come close to

showing that they include all "waters used by migratory birds." Because the migratory bird rule is constitutionally doubtful and not a construction mandated by the CWA, it cannot justify the Corps' exercise of jurisdiction over SWANCC's balefill project.

1. a. Recognizing that its bird rule is untenable under the "substantially affects" category of commerce power and the *DeBartolo* "constitutional doubt" principle, the Corps relegates its defense of the Seventh Circuit's reasoning to the last few pages of its brief. It now prefers a different theory—that "migratory birds are a shared resource of the several States" whose protection is "a task most appropriately performed by the national government." U.S. Br. 37; see *id.* at 38-42. The Corps thus invents a new, fourth prong of commerce power for any "matter of national concern." *Id.* at 38. This vague and sweeping formulation has *no* basis in this Court's precedents. *North Dakota* v. *United States* and *Missouri* v. *Holland*, on which the Corps relies, upheld statutes under the federal government's *spending and treaty powers*—and the Corps makes no claim that the migratory bird rule rests on either of those powers. *Holland*, in fact, refutes the Corps' theory: this Court expressly recognized that protection of migratory birds "may be [a] matte[r] of the sharpest exigency for the national well being that *an act of Congress could not deal with [under the Commerce Clause] but that a treaty followed by such act could*." 252 U.S. at 433.

The Corps' effort to carve out a novel Commerce Clause rule that permits it to regulate in the "national interest" any activity that affects migratory birds rests on its assertion that protecting migratory birds is "inherently unsuited to effective vindication by the States." U.S. Br. 39. That claim is both wrong and constitutionally irrelevant.

There is no "race-to-the-bottom" among States in the field of environmental regulation. As we have shown with regard to Illinois and Cook County (Pet. Br. 5-7), and as *amici* have

shown more generally,[1] States and localities have led the way in protecting wetlands—and presumably would have done still more had federal agencies not pushed them aside. Lax environmental laws might assist States in some arenas in which they compete with each other, but they are a detriment in others, such as attracting labor and non-industrial growth. Given the plethora of state environmental regulations *more* stringent than federal standards, it appears that any "race" is to the top, not the bottom. See Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210, 1227-1229, 1233-1244 (1992); Adler, *The Green Aspects of* Printz: *The Revival of Federalism and its Implications for Environmental Law*, 6 GEO. MASON L. REV. 573, 627-632 (1998).[2]

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[1] See Br. of Alabama, App.; Br. of Nationwide Public Projects Coalition 19-25; Br. of Nat'l Ass'n of Home Builders 22-23 & n.12; Br. of Nat'l Stone Ass'n 13-14 & n.10; see also Ass'n of State Wetland Mgrs., *State Wetland Regulation: Status of Programs and Emerging Trends* 20-23 (1995) (noting increasing sophistication and breadth of state regulatory programs, particularly those involving freshwater wetlands); *id.* at 37-170 (summarizing state programs).

[2] The Corps claims there has been a significant net loss of wetlands. U.S. Br. 40-41 & nn.31-32. This has not been true in recent times. See Br. of Chamber of Commerce 5 (citing government report that wetlands are created as fast as they are lost). Even if it were, it does not show *state* regulatory failure. The *Corps* destroys "more wetlands * * * than any other American developer." Grunwald, *Reluctant Regulator on Alaska's North Slope*, WASH. POST A1, A23 (Sept. 13, 2000). One recent Corps' proposal would drain 126,000 acres of wetlands—"six times more than the Corps permitted all the nation's private developers to touch last year"—for a project described by Interior Secretary Babbitt as "cockamamie" and "god-awful." Grunwald, *Working to Please Hill Commanders*, WASH. POST A1, A13-A14 (Sept. 11, 2000). Another current Corps development, described by a top EPA official as "[p]robably the dumbest project around," would drain 36,000 wetland acres. Grunwald, *An Agency of Unchecked Clout*, WASH. POST A1, A1 (Sept. 10, 2000).

Even if a "race-to-the-bottom" were a genuine fear, the Corps supplies no reason to distort the Commerce Clause and undermine the important federalism concerns it embodies when Congress has available (and has used) other, clearly constitutional ways to protect migratory birds and their habitat. These include direct protection of migratory birds under the treaty power and of habitat under the spending power (see *North Dakota*, 460 U.S. at 302-303 & n.2, 309-310; *Holland*, 252 U.S. at 431-432; Pet. Br. 49 (citing additional federal laws protecting birds, water, and wetlands)), and the power to prohibit harmful commercial activities under the Commerce Clause. See *Andrus* v. *Allard*, 444 U.S. at 54; Pet. Br. 39. And Congress also encourages States to work together to protect habitat. See CWA § 103, 33 U.S.C. § 1253. The Corps' claim that migratory birds will go undefended unless this Court restructures the commerce power is demonstrably false.

The Corps' bold but unexplained assertion (at 38-42) that it can regulate anything that has "nationwide impact" by claiming it is "inherently unsuited to effective vindication by the States" not only denigrates States' and municipalities' efforts to protect the environment and ignores Congress' vast powers in this area, but also flouts well-established constitutional principle. This Court has squarely rejected the argument that Congress—still less an agency acting by bureaucratic fiat—may regulate any area not subject to effective regulation by individual States, concluding that this assertion is in "direct conflict with the doctrine * * * of enumerated powers." *Kansas* v. *Colorado*, 206 U.S. 46, 89 (1907); see also *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 291 (1936) (rejecting proposition that "the power of the federal government inherently extends to purposes affecting the Nation as a whole with which the States severally cannot deal or cannot adequately deal"); 1 L. TRIBE, AMERICAN CONSTITUTIONAL LAW 796 n.3 (3d ed. 2000) ("The fact that no one state may have effective power to deal with a problem does not of itself extend congressional power beyond that granted by the Constitution").

The question under the federalism "framework set forth in our Constitution * * * 'is not what power the Federal Government ought to have but what powers in fact have been given by the people.'" *New York* v. *United States*, 505 U.S. 144, 157 (1992); see *Kansas*, 206 U.S. at 90. Backstopping supposedly inadequate local regulation of anything in which there is a "national interest" is not one of those powers, as this Court reaffirmed last Term. The United States contended in *Morrison* that "pervasive failures" in state regulation justify the exercise of federal power to prevent violence against women (U.S. Br. in Nos. 99-5 and 99-29, at 20-21, 32, 35-36 (filed Nov. 12, 1999), and that the Commerce Clause permits federal regulation of matters that affect the national economy "that the States have been unable to deal with on their own." U.S. Reply Br. at 1, 10-12 (filed Dec. 30, 1999). This Court rejected the government's argument in *Morrison*, and should do so again here. Virtually anything could be said in the aggregate to affect the national interest and be especially amenable to a national solution, including violence against women and crime generally; the commerce power is not so broad.[3]

b. Ultimately, the government resorts to arguing that the application of the migratory bird rule was constitutionally justified *in this case* because "the filling of ponds in order to construct a municipal landfill" is "plainly of a commercial nature." U.S. Br. 43. This theory—raised here for the first time after seven years of Section 404 permit proceedings and six

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[3] The "Virginia Plan" *would* have given Congress power "to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation." 1 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 20-21 (1966). The Framers *instead* chose a narrower scheme of specific, enumerated federal powers. See J. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 177-180 (1996); Nelson & Pushaw, *Rethinking the Commerce Clause*, 85 IOWA L. REV. 1, 25-26 n.104 (2000); *Carter Coal*, 298 U.S. at 292.

years of subsequent litigation—suffers from multiple flaws beyond the fact, explained in our opening brief, that SWANCC's municipal balefill for local municipal waste is not *interstate* commerce. Pet. Br. 45 n.19.

To begin with, the Solicitor General's new "as-applied" theory of jurisdiction is completely unrelated to the jurisdictional basis asserted in the Corps' migratory bird rule—the use of the waters as migratory bird habitat—*or* to the jurisdictional basis identified by Congress in the CWA. Congress asserted jurisdiction over fill activity because of its effect on jurisdictional "waters of the United States"—not over waters because of the commercial nature of the fill activity. The principle that Corps jurisdiction rests on a connection between the *water* and interstate commerce is apparent not only in the language of the CWA, but also in the Corps' regulatory preamble setting forth the migratory bird rule (51 Fed. Reg. at 41,217), and in more recent guidance documents. *E.g.*, EPA, *WILSON* GUIDANCE (reprinted in Br. of Center for Individual Rights, App. 6-8) (discussing basis for showing isolated water bodies have a nexus with interstate commerce, without mentioning the nature of fill activity); see CORPS, CLEAN WATER ACT JURISDICTION OVER ISOLATED WATERS (1987 "final version" of draft Corps' field guidance, reprinted in Br. of Serrano Water Dist. *et al.*, App., Exh. 24) ("An interstate commerce connection must be based on the use or potential use of the waterbody prior to the commencement of the activity subject to Corps regulatory authority. * * * [T]he fact that the fill is associated with interstate commerce does not establish the requisite interstate commerce connection for the waterbody"). We are aware of *no* prior suggestion by the Corps that the commercial nature of SWANCC's balefill is a proper basis for its jurisdiction, and of *no* prior suggestion by the Corps or EPA that the nature of fill activity is the appropriate place to look for a jurisdictional nexus over isolated waters—and the Solicitor General cites none in his brief. "[A]ppellate counsel's post hoc rationalizations for agency action" are generally unavailing. *Burlington*

Truck Lines v. *United States*, 371 U.S. 156, 168 (1962). Here they are at odds with both statutory and regulatory bases of jurisdiction.[4]

In addition, the distinction between facial and as-applied challenges makes no sense when the government relies on the aggregation principle to regulate *an entire class of activities*. The premise of the Corps' Commerce Clause argument is that it may regulate the filling of isolated waters that do or may provide habitat for migratory birds because that class of activities *in the aggregate* has a substantial effect on interstate commerce. U.S. Br. 36-37 & n.28. The government has previously represented to this Court that, where an entire class of activity is brought within federal power by the aggregation principle, *"case-by-case inquiry regarding impacts on interstate commerce is inappropriate."* *Lopez*, No. 93-1260, U.S. Reply Br., at 4 (filed Aug. 17, 1994) (emphasis added). Instead, a court determines the nature of regulated conduct—and assesses whether it is within the commerce power—by looking to the *statute or regulation* at issue and the *class* of activities it covers, rather than to the facts of an individual case. See *Maryland* v. *Wirtz*, 392 U.S. at 197 n.27 (nexus to interstate commerce in individual case irrelevant under aggregation principle); *Wickard* v. *Filburn*, 317 U.S. 111, 127-128 (1942) (same).

In *Lopez*, for example, this Court noted that "by its terms [the Gun-Free School Zones Act] has nothing to do with 'commerce' or any sort of economic enterprise," and concluded

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[4] The Corps would not disclaim jurisdiction over SWANCC's site if SWANCC proposed to make a non-commercial use of the property that involved discharging fill into ponds. Indeed, the Corps states that it has jurisdiction over "a private homeowner's decision to fill waters in his backyard without the use of a commercial contractor" (U.S. Br. 46 n.37), as well as "wet meadows," "drainage ditches," and "swimming pools." 51 Fed. Reg. at 41,217. That SWANCC's property is subject to ongoing federal regulation, whether or not the balefill goes forward, highlights the irrelevance of the commercial nature of the currently proposed use to the propriety of the Corps' rule.

that the class of regulated conduct ("possession of a firearm in a local school zone") was outside the commerce power, *despite the fact that the case involved "commercial" activity*—the delivery of a gun for a fee. 514 U.S. at 561, 563; see Pet. Br. 46. In *Morrison*, this Court considered whether the activity *regulated under the statute*, rather than the conduct challenged in the individual lawsuit, was within the commerce power. 120 S. Ct. at 1749. The same principle applies here: the bird rule encompasses *all* discharges into water used as an actual or potential habitat by migratory birds, and *that* is the class of activities that must fall within the commerce power—not the activities undertaken by a group of municipalities seeking to build a landfill in one individual instance of regulation.[5]

c. The Corps concedes that the migratory bird rule gives it jurisdiction over a host of non-commercial activities, like walking, bicycling, or driving through a wetland (58 Fed. Reg. at 45,020), or a homeowner's filling in wet patches of backyard himself. U.S. Br. 46 n.37.[6] It contends that the bird rule should

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[5] Bartlett (at 27) and the Corps (at 14) suggest that the standard for upholding federal power is lower when conduct may affect the environment in more than one state. Nothing in *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981), or any other decision suggests that the subject matter of regulation determines the level of Commerce Clause scrutiny. In *Hodel*, the Court upheld a statute regulating surface coal mining—a commercial activity that Congress expressly found affected interstate commerce—against a challenge that it was outside the commerce power. We *agree* that the commerce power is broad enough to permit regulation of activities that affect the environment in more than one state, provided those activities are commercial and substantially affect commerce under *Lopez* and *Morrison*. But environmental effects per se are not the focus of the Commerce Clause, any more than are education or protecting women from violence.

[6] The Corps asserts that *some* of these non-commercial activities are "quasi-economic" like the homegrown wheat consumption in *Wickard*. U.S. Br. 46 n.37. But in *Wickard*—"perhaps the most far

nonetheless be treated as a regulation of economic conduct because loss of migratory bird habitat is "caused overwhelmingly by commercial activities." U.S. Br. 45-46 & n.35. Like its claim that the migratory bird rule should be upheld because of the commercial nature of the conduct in this case, the Corps' argument cannot be reconciled with the "class of activities" analysis of the aggregation doctrine. We do not dispute that Congress could choose to regulate commercial landfills or other commercial conduct that displaces the habitat of migratory birds. But regulation of waters used by birds "has nothing to do with 'commerce' or any sort of economic enterprise," nor is it "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Lopez*, 514 U.S. at 561. By failing to limit itself to a class of activities within constitutional bounds, the Corps has lost the opportunity to claim that this case falls within them. See *Morrison*, 120 S. Ct. at 1752 (distinguishing between a narrower cause of action hinged on a jurisdictional element, which might be constitutional, and a cause of action giving remedy for "wider, and more purely intrastate, body of violent crime," which is not).

d. Finally, the Corps asserts (at 44) that a looser standard should be applied to assess the constitutionality of its migratory bird rule because "the Corps' determination that particular activities fall within its permitting authority does not mean that such activities are prohibited." The Corps cites nothing but an obviously inapplicable Takings Clause case for this bizarre contention, which rests on the belief that overreaching federal regulation is permissible unless the permit process is "unduly

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reaching example of Commerce Clause authority over intrastate activity" (*Lopez*, 514 U.S. at 560)—the regulated production of wheat by commercial farmers was indisputably commercial. See 317 U.S. at 115-116. The closest analogy here would be federal regulation of home gardening, which *Wickard* did *not* consider. And walking, bicycling, or driving through a wetland are outside even the broadest conception of "commercial" activity. See Pet. Br. 37-38.

burdensome" or results in denial of a permit. U.S. Br. 44-46 & n.35. The Corps could not satisfy its own test here, where it twice denied SWANCC a permit after putting SWANCC to millions of dollars of expense and causing years of delay. The Corps' claim that agency jurisdiction is judged under less stringent standards than an agency decision on the merits is wrong as a matter of law; this Court applies the same analysis to both. *Morrison*, 120 S. Ct. at 1746-1747; *Summit Health*, 500 U.S. at 324-325; *Maryland* v. *Wirtz*, 392 U.S. at 186-188; *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533, 537-538 (1944).

2. Because the bird rule lies far *outside* the commerce power, it is of no avail to the Corps to argue that Congress in the CWA intended to reach all waters *within* the commerce power. In fact, however, Congress did *not* intend for the CWA to reach so far, as reflected by the plain language of the statute, which regulates "navigable waters." Where Congress intends to regulate all waters within its commerce power, it says so directly. *E.g.*, 16 U.S.C. § 817(1) (regulating waters "over which Congress has jurisdiction under its authority to regulate commerce"); *id.* § 797(e) (same).

a. The Corps concedes (at 18-19) that the CWA's jurisdictional term "navigable waters" requires a connection to navigable waters, but says that term is nullified by its definition as "waters of the United States." The principle that all statutory terms should be interpreted to have meaning requires that a definition be understood in light of the defined term;[7] thus, a water body must have some water-based connection to "navigable waters" to fall within "waters of the United States."

[7] Contrary to the Corps' assertion (at 19 n.12), nothing in *Sweet Home* suggests that defined terms should be read as mere surplusage. Courts consistently interpret the definition of "take" in the Endangered Species Act by reference to the defined term. *E.g.*, *Loggerhead Turtle* v. *County Council*, 148 F.3d 1231, 1237 (11th Cir. 1998) (interpreting "'[h]arass' and 'harm' within the meaning of 'take'").

Indeed, as we have explained (at 15-16), "waters of the United States" *referred* at common law to *navigable* waters.[8] The term "navigable" may be of "*limited* import" (*Riverside Bayview*, 474 U.S. at 133), but "limited" is more than none.

b. The Corps contends (at 19-20) that the CWA's goals suggest its "coverage is not confined by traditional concepts of navigability." But statutory objectives do not override statutory text (see Pet. Br. 19)—particularly where those goals apply to a multifaceted regulatory program of which Section 404 is only one small part. Notably, the government completely ignores the express statutory objective with which it disagrees, "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] plan the development and use * * * of land and water resources." 33 U.S.C. § 1251(b).

c. The government points to Section 404(g)(1) as the "clearest textual indication" that Section 404 applies to the limits of the commerce power. U.S. Br. 20-21, 27. If this is the

[8] The Corps wrongly claims (at 18 n.11) that this traditional meaning applies only to the phrase "*navigable* waters of the United States." But the CWA refers to "waters of the United States" as "navigable waters," making it necessary to consider both terms together. Furthermore, Congress and this Court have long treated the phrases "waters of the United States" and "navigable waters of the United States" as interchangeable. River and Harbors Act, § 10, 30 Stat. 1121, 1151 (1899); *Gromer* v. *Standard Dredging Co.*, 224 U.S. 362, 367 (1912); *North Shore Boom Co.* v. *Nicomen Boom Co.*, 212 U.S. 406, 411 (1909). The phrase "waters of the United States" also distinguishes waters subject to federal power from interior waters *of the States*—a distinction that disappears entirely under the Corps' approach. See *Donnelly*, 228 U.S. at 262; *First Iowa Hydro-Elec. Coop.* v. *FPC*, 328 U.S. 152, 170 (1946); *Perry*, 191 U.S. at 28. The "normal rule" is that Congress is understood to have changed such established meanings only if "it makes that intent specific," which it did not do in the CWA. *Midlantic Nat'l Bank* v. *New Jersey*, 474 U.S. 494, 501 (1986).

"clearest indication," the case should be over. The provision applies to waters beyond those navigable in fact or with improvement and their adjacent wetlands, such as non-navigable streams and tributaries that feed into navigable waters. But it simply begs the question to say it applies to isolated waters. Section 404(g)(1) does not affirmatively define the scope of waters it covers and was enacted five years *after* Section 404(a); it gives *no* guidance as to the statute's outer limits. See *Capital Gains Research Bureau*, 375 U.S. at 199-200.[9]

d. The Corps resorts to legislative history that it admits (at 24) displays "a degree of ambiguity." Legislative history—especially ambiguous legislative history—cannot "cloud a statutory text that is clear." *Ratzlaf* v. *United States*, 510 U.S. 135, 147-148 & nn.17-18 (1994). In fact, however, there is no ambiguity in the legislative history as to the critical issue here. Although Congress reached beyond the narrowest common law conception of "navigable waters" as waters navigable in fact to a broad interpretation of *navigable* waters, there is no evidence that it intended to reach *all waters* despite the narrower text of the statute.

The bills passed by the House and Senate regulated discharges into "navigable waters," defined to include *only* navigable waters or waters connected to them.[10] Committee reports confirm Congress' intent to require a connection to navigable waters as a prerequisite for regulation. *E.g.*, 2 Leg. Hist. 1972

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[9] The legislative history of Section 404(g)(1) is similarly unilluminating. The Conference Report explains only that the provision permits States to regulate "discharge of dredged or fill material into the navigable waters other than traditionally navigable waters and adjacent wetlands." 3 Leg. Hist. 1977 at 288.

[10] H.R. 11896 defined "navigable waters" as "the navigable waters of the United States, including the territorial seas." 1 Leg. Hist. 1972 at 1069. S. 2770 defined them as "the navigable waters of the United States, portions thereof, and the tributaries thereof, including the territorial seas and the Great Lakes." 2 Leg. Hist. 1972 at 1698.

at 1495 (S. Rep.) ("Water moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source. Therefore, reference to the control requirements must be made to the navigable waters, portions thereof, and their tributaries"). In conference, the bill was amended slightly to clarify Congress' intent to reach all waters that form part of a "continuing highway over which commerce is or may be carried." 1 Leg. Hist. 1972 at 178 (S. Conf. Rep.).[11] House floor manager Dingell's floor statement, from which the Corps selectively quotes, confirms the focus of the statutory definition on the water's use as a channel of commerce. *Id.* at 250.[12] Neither the Conference Report nor floor debate contains any hint that Congress meant to regulate all water regardless of its connection to navigable waters.[13]

e. The 1977 legislative history has little relevance in interpreting statutory provisions enacted five years earlier. See *Consumer Prods. Safety Comm'n*, 447 U.S. at 118 n.13. In any event, it does not help the Corps. The question before Congress in 1977 was not whether to approve Corps authority over all

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[11] The Interior Department had interpreted the quality standards in the Water Quality Act of 1965 to apply solely to *interstate* waters—waters that flow across State or national borders. S. DEGLER, FEDERAL POLLUTION CONTROL PROGRAMS 6-7, App., at 53, 59-60 (1971). As noted in the committee reports quoted by the Corps (at 22), Congress sought to broaden this regulatory authority.

[12] Rep. Dingell explained that the "'gist of the Federal test'" was the water's "use 'as a highway,'" citing *Utah* v. *United States*, 403 U.S. 9 (1971), and *United States* v. *Underwood*, 344 F. Supp. 486 (M.D. Fla. 1971). *Utah* involved a lake navigated by boats transporting cargo, *Underwood* a river traversed by tour boats. Both rejected the argument that federal jurisdiction was lacking if navigation occurred only within a single State. 403 U.S. at 10; 344 F. Supp. at 492.

[13] The post-CWA report of the House Committee on Operations relied on by the Corps (at 3 n.1) does no more than state the view that the Act reaches wetlands adjacent to traditional navigable waters. H.R. REP. NO. 93-1396, at 23-27 (1974).

waters with a nexus to interstate commerce, as the Corps suggests, but how best to deal with "problems created by the corps' interpretation of section 404." 123 Cong. Rec. 26,711 (1977) (Sen. Muskie). The focus of those "problems" was the Corps' briefly asserted (and quickly repudiated) statement in a press release that could require permits for "the rancher who wants to enlarge his stock pond, or the farmer who wants to deepen an irrigation ditch or plow a field, or a mountaineer who wants to protect his land against stream erosion." 4 Leg. Hist. 1977 at 1263, 1343, 1347, 1350, 1386; 40 Fed. Reg. 41,292, 41,292 (Sept. 5, 1975). Notably, everyone—including the members of Congress quoted by the Corps—agreed that this jurisdictional claim far overstepped statutory bounds.[14]

Some members of Congress felt that the best way to prevent future Corps overreaching was a House amendment (H.R. 3199) that would have limited "navigable waters" to waters navigable in fact or with improvements and their adjacent wetlands—a definition that would have excluded even tributaries, streams, and other waters with a surface connection to navigable waters, thereby returning federal jurisdiction to pre-1972 levels. See 4 Leg. Hist. 1977 at 1157-1158, 1218-1219, 1250. Critics successfully advocated retaining the limits of the 1972 Act to protect the "[f]ederal interest in waterways other

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[14] *E.g.*, 4 Leg. Hist 1977 at 1248-1249 (Reps. Edgar and Myers) (Corps press release "grossly distorted" scope of Section 404); *id.* at 948 (Sen. Muskie) (Corps' interpretation "expand[ed Section 404] far beyond the intent of Congress"); 123 Cong. Rec. at 26,711 (Sen. Bentsen) (federal authority over "small streams, ponds, isolated marshes, and intermittently flowing gullies * * * runs counter to the original intent of the legislation"); *id.* at 26,721-26,722 (Sen. Tower) (Corps' claim of jurisdiction over "all surface waters and wetlands" conflicts with the "original intent of navigable waters" in the CWA); *id.* at 10,418 (Rep. McKay) ("I do not think Congress intended" to give Corps authority over "any stream, ditch, or pond in the United States"); *id.* at 10,431 (Rep. Wright) (Corps' claim of jurisdiction violates "original intent of Congress").

than those on which a ship can be floated," including "small streams, marshes, wetlands, and swamps *which will make their way into the bigger waterways* of this country." *Id.* at 908 (Sen. Hart) (emphasis added). That equivocal evidence is a far cry from *Bob Jones*, where Congress rejected 13 bills to overturn an agency position and expressly approved of it in legislative enactments, or *Brown & Williamson*, where Congress enacted multiple statutes that assumed the correctness of the agency's 35-year-old stance. It is certainly not enough to show that Congress "acquiesced" in the Corps' interpretation in the face of a different interpretation supported by text and the 1972 legislative history. See Pet. Br. 24 (collecting cases).

The Corps points (at 25-27) to a handful of statements in 1977 suggesting some in Congress thought Section 404 reached broadly, but omits statements to contrary effect. For example, the Committee Report for S. 1952, the predecessor Senate bill, describes the waters subject to regulation under Section 404 as comprised of traditional navigable waters (regulable by the Corps) and "lakes, rivers, streams, swamps, marshes, and other portions *of the navigable waters* outside the corps program." 4 Leg. Hist. 1977 at 708. It explains that

> [r]estriction of jurisdiction to those relatively few waterways that are used or are susceptible to use for navigation would render [protection of the Nation's waters] impossible to achieve. Discharges of dredged or fill material *into lakes and tributaries of these waters* can physically disrupt the chemical and biological integrity of the Nation's waters and adversely affect their quality.

Ibid. (emphasis added); see, *e.g.*, 3 Leg. Hist. 1977 at 348-349 (House manager of the compromise bill said it "retains the basic principles of the House amendment" [H.R. 3199] regarding limited federal authority over non-navigable waters).

At no time during consideration of the 1977 amendments did Congress approve of Corps jurisdiction over all isolated waters with a connection to interstate commerce. Indeed, the

Corps did not seek to regulate all isolated waters until July 19, 1977—*after* passage of H.R. 3199 and just days before Senate debate on S. 1952. 42 Fed. Reg. at 37,127-37,128. Even then, Congress had no practical reason to protest the Corps' interpretation because the Corps simultaneously *exempted* virtually all isolated waters (including *all* waters less than 10 acres in surface area) from permit requirements. 42 Fed. Reg. at 37,130.[15] In these circumstances, "[i]t is impossible to assert with any degree of assurance that congressional failure" to overrule the Corps' brand new regulation shows "affirmative congressional approval" of its claim of jurisdiction over all isolated waters. *Central Bank*, 511 U.S. at 186; see *Schneidewind* v. *ANR Pipeline Co.*, 485 U.S. 293, 306 (1988).

Even if Congress *had* acquiesced in the Corps' claim of jurisdiction over all isolated waters with a connection to interstate commerce, that *still* would not show acquiescence in the migratory bird rule. There was *no* suggestion as of 1977 that the Corps could regulate an isolated water because migratory birds used it. In June 1985 the Corps was still telling Congress that migratory birds would *not* generally support jurisdiction. See *Oversight Hearings on Section 404 of the Clean Water Act before Senate Comm. on Env'tl Pollution of Comm. on Env't*

[15] Because there is no evidence that Congress was aware of and approved its 1977 regulation, the Corps relies heavily on its 1975 interim regulation. But the Corps *admitted* in 1977 that an "intent [to reach isolated wetlands] *was not clearly expressed*" in its 1975 regulations. 42 Fed. Reg. at 37,129. The 1975 regulations asserted jurisdiction over "[i]ntrastate lakes, rivers, and streams"—waters which typically are, or connect to, navigable waters—with specified, very particular commercial uses, and stated that the Corps *could* determine that particular "intermittent rivers, streams, tributaries, and perched wetlands that are not contiguous or adjacent to navigable waters" were jurisdictional where necessary "for the protection of water quality" (not birds). 40 Fed. Reg. at 31,325. The Corps was right in 1977 that this language does not show that it meant to regulate all water to the limits of the commerce power.

and Publ. Works, 99th Cong. 114 (1985) ("The limited use of a water by a migratory species in interstate traveling has been determined to be insufficient to establish jurisdiction"); *id.* at 121-123. Only under pressure from Senators Mitchell and Chafee did the Corps later express a general policy of regulation. *Id.* at 114, 168, 190, 193. The Corps has not pointed to *any* approval by Congress of *that* step.

f. No *Chevron* deference is due to an agency interpretation that contravenes statutory text by simply ignoring the term "navigable waters" and the settled meaning of "waters of the United States." The distinction between waters with a hydrologic connection to navigable waters and other types of waters is not "unclear" (U.S. Br. 31), but grounded in the text itself.

Furthermore, deference does not apply because three established rules of statutory construction—avoidance of constitutional doubt, a presumption against significant intrusions on state authority, and the rule of lenity—leave no ambiguity in the statute. Pet. Br. 26-36. The Corps offers *no* explanation why the rule of lenity does not apply. It claims (at 32 n.23) that the avoidance principle is inapplicable because *it* has authority to decide what activities are sufficiently connected with interstate commerce to fall within federal power. That argument —identical to one rejected last Term in *Jones*, see U.S. Br. 13-17 in No. 99-5739 (filed Feb. 7, 2000)—assumes that Congress intended to delegate the full scope of its power to the Corps. Congress' intent to do so is hardly clear; that is why the avoidance principle applies. See Pet. Br. 13-16.[16]

[16] The Corps claims that *Darby* defuses the serious delegation problems raised by its interpretation. But *Darby* involved statutes in which Congress expressly defined the nexus to interstate commerce required for regulation. 312 U.S. at 119-120. Here, the Corps considers itself unfettered by a congressionally-chosen nexus, free to decide that *any* type of effect on interstate commerce, caused by *any* type of conduct, will support federal regulation. It claims, in short,

Remarkably, the Corps asserts (at 33-34 & n.25) that its regulation of isolated waters used by migratory birds does not intrude on traditional areas of state and local authority because the Corps considers local interests in making permitting decisions. The Corps reviews state and local land use decisions in light of its view of "the public interest," engaging in a "general balancing" of factors including "economics," "aesthetics," "land use," "the needs and welfare of the people" (33 C.F.R. § 320.4(a)(1)), and the "practicability of * * * alternative locations" (*id.*, § 320.4(a)(2)(ii)), and it freely rejects "local * * * decisions" whenever it thinks issues of "national importance" are "overriding." *Id.*, § 320.4(j)(2). There can be no doubt, as these factors and the 47,000 page record attest, that Section 404 permitting is in the nature of general land use regulation. Here, the Corps overrode considered decisions of Illinois, Cook County, and SWANCC (a 23-member municipal corporation representing 700,000 people) concerning the need for and environmental suitability of SWANCC's balefill. The Corps has delayed by more than a decade SWANCC's effort to find a local solution to the problem of disposing of local garbage and has wasted tens of millions of dollars of public money. This massive intrusion on state sovereignty is the hallmark of Corps regulation. It blatantly contradicts Congress' expressly-stated intention "to recognize, protect, and preserve the primary rights and responsibilities of States" in this field. 33 U.S.C. § 1251(b).

The Corps does not contest our description (Pet. Br. 34-36) of the troubling history of the "other waters" and bird rules. To the contrary, it admits (at 3-4) that it is really asking this Court to defer to the unexplained decision of the district court in *Callaway*, which ordered the Corps to overturn its prior interpretation and expand its jurisdiction "to the maximum extent permissible under the Commerce Clause." 392 F. Supp. at 686; see Pet. Br. 34. The Corps simply acquiesced in that order.

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the power to make law. That view is unprecedented and raises sufficient constitutional problems to warrant its rejection. See Pet. Br. 33-34.

Ultimately, the government claims deference (at 31) because it is "reasonable" to interpret Section 404 as "a jurisdictional standard that turns on the *prospect of interstate effects* resulting from water pollution, rather than on a particular causal mechanism * * * by which those effects may be produced" (emphasis added). This nebulous "standard" forsakes the CWA's text, which regulates the "navigable" "waters of the United States," for a speculative, elastic, and unconstrained focus on "prospect[ive] effects": *any* discharge into *any* water that has the *prospect* of some interstate effect. That interpretation gives the statute's "limiting language" "no office," rides roughshod over traditional State powers, and is therefore patently *un*reasonable. *Jones*, 120 S. Ct. at 1911.[17]

3. The Corps makes several misleading factual statements. First, it misrepresents (at 6, 8) that SWANCC's proposed balefill is "directly above an aquifer that supplies drinking water to the region," and that there is a risk of contamination if the project goes forward. In fact, as the Corps told Congress, the site is 3,000 feet away from the aquifer and poses a "negligible risk" "so small and trifling that it may safely be disregarded." AR 38332-38333. Directly below the site is 40 feet of bedrock, topped by 21 feet of impervious clay, which would be buffered by more compacted clay and a synthetic liner; furthermore, the Corps observed, the site's "inward gradient" means water will "seep into the project rather than out." *Id.* at 38327-38328, 38330. In the "highly unlikely" event of a leak, the Corps observed, it would take 20 to 40 years for

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[17] The Corps pretends (at 35 n.27) that our interpretation of the CWA would undermine federal prohibition of toxic discharges. It would not. The Solid Waste Disposal Act prohibits *all* open dumping of hazardous waste (42 U.S.C. §§ 6903(5),(14),(27), 6945(a)), and the Toxic Substances Control Act requires EPA to regulate the "disposal" of "hazardous chemical substances and mixtures" (15 U.S.C. § 2605)—powers that do not depend on the meaning of "navigable waters" in the CWA. State laws prohibiting dumping of toxic material would also be unaffected. *E.g.*, 415 ILCS 5/12, 25/1.

contaminants to reach the aquifer, "afford[ing] more than adequate response time." *Id.* at 38332. The Corps' sole aquifer-related reason for denying the permit was its belief that SWANCC's 23 municipal corporations had not "conclusively" proved that if SWANCC's $20-million-plus remediation fund were somehow exhausted, they could finance maintenance and remediation. See Pet. Br. 6, 10.[18]

Second, the Corps states (at 9 & n.8) that the Fish and Wildlife Service opposed the balefill, quoting an "initial comment letter" that predates SWANCC's final mitigation proposal. AR 16371. In fact, FWS subsequently told the Corps that SWANCC's "revised proposal adequately mitigates impacts to area-sensitive birds" and that its proposed relocation of the heron colony was "justified" and could "over time provide equivalent if not augmented nesting opportunities for these birds." AR 16371-16372. The Corps' willingness to twist these facts matches its willingness to ignore governing law in trying to defend a regulation outside its statutory and constitutional authority.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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[18] Bartlett claims (at 14, 17 n.6) that a Congressional enactment that required the Corps to *report* to Congress on the effect of SWANCC's proposed landfill on the water quality of the aquifer, "demonstrates tacit Congressional approval of the assertion of [CWA] jurisdiction." This rider to a bill authorizing appropriations contains no suggestion that Congress approved, or even considered, Corps jurisdiction, and this Court presumes that such measures make no change in existing law. See *TVA* v. *Hill*, 437 U.S. 153, 189-192 (1978).

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